

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
 . Detroit, Michigan  
 . December 16, 2013  
Debtor. . 2:30 p.m.  
. . . . .

HEARING RE. MOTION TO MODIFY AUTOMATIC STAY; MOTION FOR  
RECONSIDERATION/REHEARING; MOTION FOR RELIEF FROM STAY  
AND WAIVING THE FRBP 4001 (a)(3) RE. ALLOW CIVIL LITIGATION  
TO PROCEED FOR DISCOVERY PURPOSES AND/OR TO RECOVER ANY  
INSURANCE COVERAGE UNDER DEFENDANTS' HOMEOWNER'S INSURANCE  
POLICIES; MOTION FOR RELIEF FROM STAY FILED BY CREDITOR  
ST. MARTINS COOPERATIVE; MOTION FOR RELIEF FROM STAY  
FILED BY INTERESTED PARTIES ST. JAMES COOPERATIVE, JOLIET  
TOWN HOUSES COOPERATIVE ASSOCIATION, LAFAYETTE TOWN HOUSES,  
INC., NICOLET TOWN HOUSES COOPERATIVE ASSOCIATION,  
LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: All rise. Court is in session. Please  
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: One moment, please. I'd like to deal  
4 first with the motion for relief from stay filed on behalf of  
5 Mobley and other parties.

6 MR. KOROBKIN: Thank you, your Honor. Good  
7 afternoon, your Honor. Daniel Korobkin on behalf of --

8 THE COURT: You need to stand at the lectern and  
9 speak into the microphone to get your appearance on the  
10 record.

11 MR. KOROBKIN: My apologies, your Honor. Daniel  
12 Korobkin on behalf of Ian Mobley, et al., who are the movants  
13 on this matter, and with me are Ron Rose from Dykema and  
14 Michael Steinberg also from the ACLU.

15 THE COURT: Okay. You may proceed.

16 MR. KOROBKIN: Thank you, your Honor. Well, most of  
17 the issues are briefed, but I wanted to point to several  
18 aspects of the case that we believe make this motion  
19 particularly compelling. Number one, the Sixth Circuit case  
20 at issue here and its outcome is completely unrelated to the  
21 bankruptcy, and so it'll have no adverse impact on the  
22 bankruptcy or the estate if the stay is lifted.

23 Secondly and relatedly, the Sixth Circuit case at  
24 issue here has been completely briefed, so allowing the  
25 appeal to proceed is not going to be expensive, time-

1 consuming for the city in any appreciable way.

2           Number three, furthermore, the plaintiffs are not  
3 seeking permission to enforce a judgment or collect money  
4 damages outside of the bankruptcy forum. They're asking for  
5 a limited stay -- limited relief from the stay of allowing  
6 the Sixth Circuit to rule on the legal issues after which the  
7 plaintiffs have agreed that the stay can be reinstated, and  
8 their claim will likely proceed through the claims resolution  
9 process. And finally -- and I think this is the heart of the  
10 motion and the most important point -- is this is an appeal  
11 where the public interest, your Honor, in allowing the Sixth  
12 Circuit to rule weighs heavily in favor of lifting the stay.  
13 Mobley is an important civil rights, civil liberties case  
14 that was brought to challenge a widespread practice by the  
15 Detroit Police Department of arresting innocent people and  
16 seizing their cars based merely on their presence at a  
17 location where some other illegal activities is taking place  
18 and without probable cause that those individuals are  
19 actually involved in the illegal activity.

20           Now, this case was litigated for years based on the  
21 plaintiff's goal, the plaintiff's goal not principally of  
22 recovering a large damages award but, rather, to put an end  
23 to this constitutional practice and deter the same thing from  
24 happening to others. So, in other words, this case  
25 exemplifies the tradition of private parties acting in the

1 public interest by filing a Section 1983 case, investing  
2 years of time and effort building an appropriate record and  
3 then seeking a clear published decision by the federal  
4 appellate court that will establish binding precedent for the  
5 future. And, in fact, as indicated on our brief with a very  
6 lengthy quote from a U.S. Supreme Court case, the Supreme  
7 Court has explicitly recognized that it's Congress' intent  
8 for Section 1983 cases such as this one to vindicate  
9 important public interests in civil rights and civil  
10 liberties that -- and those interests themselves transcend  
11 the monetary value of whatever damages award may result. And  
12 so the Supreme Court recognized that the relief a plaintiff  
13 obtains in a case like this secures important social benefits  
14 that are not reflected in small damages awards. Well,  
15 building on that, those social benefits are even greater.  
16 They're even more obvious here when a federal appeals court,  
17 which is the case here, is in a position to issue a  
18 precedential decision on important matters of constitutional  
19 law. And if the stays in this case are lifted, this benefit  
20 can be realized by virtue of wherever this case is at  
21 procedurally at virtually no cost to the city or the estate.

22           So to summarize, the plaintiff's motion requires the  
23 Court to balance the harms and equities, and we submit that  
24 when one compares the tremendous interests supporting the  
25 plaintiff's motion with the truly minimal expense that the

1 city might incur if the stay is lifted on an already briefed  
2 appeal, it's clear that the equities favor the modest and  
3 limited relief we are seeking here.

4 THE COURT: Remind me when were the events that gave  
5 rise to the claim?

6 MR. KOROBKIN: The events occurred in 2008, your  
7 Honor, so we've been working on this for five years.

8 THE COURT: Is it your position that the city's  
9 practices that you describe in your complaint or that form  
10 the basis of your complaint are still going on?

11 MR. KOROBKIN: Well, it was certainly the finding of  
12 the District Court that they were widespread; that they were  
13 a custom and policy and a standard operating procedure of the  
14 Detroit Police Department, and although it's not a matter of,  
15 I suppose, the official record, we tried to get this case  
16 resolved through an agreement by the city to stop doing --  
17 stop engaging in this particular act, and that attempt was  
18 unsuccessful, and so it's our position -- and not only that,  
19 but when we won summary judgment at the District Court level  
20 where the District Court ruled that this practice was  
21 widespread and unconstitutional, the defendants appealed, so  
22 it seems that they have the position that they should be able  
23 to continue doing this. It's obviously our position that  
24 it's unconstitutional, and this is the kind of -- this is  
25 exactly the kind of case that Congress had in mind, that the

1 Supreme Court had in mind that will resolve this once and for  
2 all.

3 THE COURT: Do you have any evidence that it's still  
4 going on?

5 MR. KOROBKIN: It wasn't our -- you know, it wasn't  
6 our goal to collect that evidence in terms of --

7 THE COURT: The answer is no?

8 MR. KOROBKIN: The answer -- well, I guess I can't  
9 present it to the Court.

10 THE COURT: Thank you.

11 MR. FUSCO: Good afternoon, your Honor. Timothy  
12 Fusco, Miller, Canfield, Paddock & Stone, for the city.

13 THE COURT: Is this still going on?

14 MR. FUSCO: Pardon me?

15 THE COURT: Is this still going on?

16 MR. FUSCO: No, your Honor, no. The appeal -- and  
17 that's one thing I do want to correct. We did not take the  
18 appeal so we could continue the practice. The appeal was  
19 taken on the narrow issue of qualified immunity of the  
20 officers. That is one area where you can take an  
21 interlocutory appeal, and, quite frankly, that was done in an  
22 effort to posture the city better for negotiating a  
23 resolution of the damage claim that if we were --

24 THE COURT: But your representation to the Court is  
25 that the city has stopped this practice?



1 MR. FUSCO: I've asked the city attorney, and it is  
2 not a policy of the city.

3 THE COURT: As of when?

4 MR. FUSCO: After Judge Roberts said we did it  
5 wrong. We're not disputing. That's not the issue that's in  
6 front of the Court of Appeals. The issue in front of the  
7 Court of Appeals is the narrow issue of whether these  
8 officers reasonably believed what they were doing was  
9 authorized and whether they should have personal liability  
10 for the actions that they took. They've been indemnified by  
11 the city for any damage award, so the very -- we're in front  
12 of the Sixth Circuit because the city appealed. The NAACP  
13 had no -- or the plaintiffs had no right to appeal this  
14 action, and, in fact, if the Court were to lift stay, we  
15 would likely move to withdraw our appeal. This is an action  
16 for damages.

17 Now, 1983, one of the prophylactic effects of 1983,  
18 it allows you to obtain damages, which can act as a  
19 deterrent, and we, I assume, will negotiate a damage award  
20 with the plaintiffs as part of the alternative dispute  
21 procedures, which the plaintiffs agree they must adhere to in  
22 order to determine the amount of the claim. And, again, they  
23 seem to believe that the appeal in front of the Sixth Circuit  
24 is the broader issue raised in the lawsuit of whether this  
25 course of conduct is constitutional or not. We have a ruling

1 on that. It's public. It was not. What the city did was  
2 improper and to my knowledge and what I've been told is not  
3 continuing now. In the context of the Chapter 9 case, the  
4 city does not need to be put to this appeal, one that it  
5 initiated and it will move to withdraw. What we should be  
6 doing is getting into the ADR process where we're faced  
7 with -- we have a judgment against us. We lost. That's not  
8 going to change on whatever the Sixth Circuit does, and  
9 that's the context in which we're going to resolve the  
10 monetary dispute. This case was brought for monetary  
11 damages, not for injunctive relief, and we will have to deal  
12 with that, so we see no purpose in lifting stay at this  
13 point.

14 THE COURT: Thank you. If the city --

15 MR. KOROBKIN: Your Honor, very --

16 THE COURT: -- has stopped the practice, where's the  
17 public interest in proceeding?

18 MR. KOROBKIN: Your Honor --

19 THE COURT: Haven't you won?

20 MR. KOROBKIN: What's that?

21 THE COURT: Haven't you won?

22 MR. KOROBKIN: Well, we did -- won in the District  
23 Court, your Honor, but it was the city's position --

24 THE COURT: Did you learn in law school that when  
25 you win, you sit down?

1 MR. KOROBKIN: If we had -- if we had won a  
2 precedential decision in the Sixth Circuit that this practice  
3 is unconstitutional and that were the binding precedent of  
4 the Sixth Circuit, we would sit down.

5 THE COURT: Why do you need that?

6 MR. KOROBKIN: Because, your Honor, the city --  
7 notwithstanding what Mr. Fusco said, the city has taken the  
8 position not only in the District Court but even in the Sixth  
9 Circuit in their brief that what they did and what, for all  
10 we know, they continue to do or intend to resume in the  
11 future is okay.

12 THE COURT: It's the "for all we know" part that  
13 makes it hard for the Court to justify granting relief from  
14 the stay. I asked you if you had any evidence that they were  
15 still doing it, and you said no, and Mr. Fusco says we've  
16 stopped. That's the record.

17 MR. KOROBKIN: Well, I think the -- I guess the  
18 record is neither that they're doing it nor that they're not  
19 doing it, but I think in the Supreme --

20 THE COURT: Well, but you don't have any reason to  
21 suspect Mr. Fusco's representation to the Court.

22 MR. KOROBKIN: Well, I do, and not -- nothing to do  
23 with Mr. Fusco, but the city's position in this case is --  
24 Mr. Fusco said that it is not the city's policy. The city's  
25 position in this case has always been that this is not their

1 policy. The District Court found otherwise. The city  
2 appealed, and that's one of the issues on appeal. Now, in  
3 the --

4 THE COURT: Let me ask you this --

5 MR. KOROBKIN: Yeah.

6 THE COURT: -- very direct question. If in the  
7 last five years or three years or two years or last year or  
8 six months there had been another incident like this one,  
9 wouldn't the ACLU have heard about it?

10 MR. KOROBKIN: Yes. We have heard --

11 THE COURT: And you haven't?

12 MR. KOROBKIN: No. I wanted to be very clear with  
13 your Honor that we have no evidence that we can put before  
14 the Court right now that says the city is continuing a  
15 practice of this. We have certainly heard evidence of that.

16 THE COURT: Well, then I have to ask again why do  
17 you need another court to tell you this is unconstitutional  
18 if the city has stopped doing it?

19 MR. KOROBKIN: Well, for one thing because they  
20 either haven't stopped doing it or they could resume doing it  
21 at any time. They've taken the legal position that they wish  
22 to have it known under the law that they can do this. And,  
23 quite frankly, your Honor --

24 THE COURT: Would it solve your problem if you hear  
25 of another incident to refile a motion for relief from the

1 stay?

2 MR. KOROBKIN: No. Unfortunately, your Honor, I  
3 don't think it would, and that's because these cases take  
4 years and years to build, and the goal in building this  
5 case -- because of why it's -- because of how difficult it is  
6 to get injunctive relief against police misconduct, the goal  
7 in building this case was to build a very clear record of  
8 what happened in the past and get it on the books that this  
9 is unconstitutional. We know that when we build that record  
10 and when we get a precedential ruling that that's  
11 unconstitutional, that that will have a deterrent effect on  
12 future conduct, but we don't know that that's the case when  
13 we get a district judge -- a District Court's ruling and then  
14 the city appeals. There are law enforcement agencies all  
15 over the state and possibly in other states that are waiting  
16 to hear whether or not this is going to be --

17 THE COURT: How will it help you to get a binding  
18 precedent on the issue of whether the city's practice was  
19 unconstitutional when that isn't even the issue before the  
20 Court?

21 MR. KOROBKIN: Yes. Your Honor, I disagree  
22 respectfully with Mr. Fusco that that's not the issue before  
23 the Court. In our reply brief we cite -- and it's in a  
24 footnote, but we cite the Sixth Circuit case that talks about  
25 the overlap between qualified immunity appeals and city

1 policy appeals. And in a qualified immunity appeal, there  
2 are two questions. One is whether the plaintiff's rights  
3 were violated, and the second is whether it was clearly  
4 established that those were their rights. Now, the first  
5 question overlaps with the question of what -- whether the  
6 city's policy or practice is unconstitutional, and that's  
7 what we would be achieving with the Sixth Circuit ruling.  
8 And the city's brief in the Sixth Circuit didn't -- they  
9 didn't -- unlike Mr. Fusco today, they didn't say, well, we  
10 know this is unconstitutional. This is just a narrow  
11 question of the officers' qualified immunity. They said what  
12 we did was perfectly fine, and we want the Court to  
13 acknowledge that. And then, of course, as their back-up  
14 argument, even if it was unconstitutional, these individual  
15 officers are entitled to immunity. Well, you know, frankly,  
16 your Honor, you know, if since what we've asked for from the  
17 Sixth Circuit is -- or if what we asked for from this Court  
18 is not an ability to enforce a judgment or collect money  
19 damages outside of the bankruptcy forum, even if the Sixth  
20 Circuit says it wasn't clearly established, it will be a  
21 victory for civil rights in and of itself if the Sixth  
22 Circuit rules in a precedential decision that this -- these  
23 kinds of arrests, this kind of practice is unconstitutional.  
24 It'll have an effect here in Detroit. It'll have an effect  
25 in Wayne County where the Wayne County Sheriff's Office does

1 a lot of raids of this kind, and it'll have an effect all  
2 over the state and in other states in the Sixth Circuit as  
3 well. I think this is an important case. It's an important  
4 decision, and if you compare the minimal burden to the city  
5 right now of simply having to argue --

6 THE COURT: Where are you -- where are you if the  
7 motion is granted and the city withdraws the appeal?

8 MR. KOROBKIN: I suppose that's up to the city if  
9 they want to -- if they want to withdraw the appeal, but, you  
10 know, they were the ones who took the appeal, so they  
11 obviously wanted it to be --

12 THE COURT: So you're nowhere.

13 MR. KOROBKIN: I'm sorry.

14 THE COURT: So you're nowhere.

15 MR. KOROBKIN: Well, we're where we were at the  
16 beginning of the -- before the motion was -- before the  
17 motion was brought, but, of course, I think the burden should  
18 be on the city to decide whether they want to continue this  
19 appeal or not when the equities really favor --

20 THE COURT: What they want to do is move this to ADR  
21 and pay you some money.

22 MR. KOROBKIN: Yes, your Honor, and we were -- we've  
23 been involved in negotiations throughout this case, and, of  
24 course, the sticking point was whether they were going to  
25 stop this practice. And throughout the -- throughout the

1 negotiations they said we refuse to agree or stipulate that  
2 we will stop this practice, and so when your Honor asked the  
3 question --

4 THE COURT: What they refused to do was to stipulate  
5 to an injunction that you didn't ask for to stop the  
6 practice.

7 MR. KOROBKIN: In fact, we asked for an injunction  
8 in our complaint. We decided not to pursue that because we  
9 thought that the grounds for summary judgment on damages were  
10 so great, and we were not asking for an injunction from the  
11 Court. We were asking for their stipulation to change their  
12 policy, to make it an official policy of the city that they  
13 were not going to do this, and they refused. That was a  
14 sticking point of the negotiations. It didn't happen. And  
15 now I think the alternative is to get a precedential ruling  
16 that what they were doing and what they apparently --

17 THE COURT: Mr. Fusco say they've -- that the city  
18 has changed its policy.

19 MR. KOROBKIN: I mean, your Honor, there's no  
20 evidence of that. There's absolutely no evidence of that.

21 THE COURT: Well, it seems to me that the  
22 representation by an attorney on behalf of a party in a court  
23 of law is really good evidence of that.

24 MR. KOROBKIN: Your Honor --

25 THE COURT: If not true, somebody has got some



1 'splainin' to do.

2 MR. KOROBKIN: Well, your Honor, I'm not accusing  
3 Mr. Fusco of lying, but he said it wasn't the city's policy.  
4 That has always been -- that has always been the city's  
5 position, that it's not their policy, but the District Court  
6 found that it was their practice and they're liable for it,  
7 and I believe that what they're trying to do here is make  
8 sure that they don't get a precedential ruling from the Sixth  
9 Circuit that says they can't continue to do this. I suppose  
10 it's their obligation as counsel for the city to try to make  
11 sure that doesn't happen, but I don't think that the solution  
12 is to take them at their word after five years of litigating  
13 this very, very important issue. I think that the right  
14 thing to do would be to weigh the equities, to balance the  
15 harms --

16 THE COURT: Suggested that other police departments  
17 around are still doing this?

18 MR. KOROBKIN: Yes, in various forms.

19 THE COURT: Can you recount any specific incidents?

20 MR. KOROBKIN: I know there was recently a case  
21 involving the Westland police and some sort of, you know,  
22 interdepartmental task force. There have been other -- I  
23 mean there have been other incidents for sure, and we -- and  
24 I'll tell you, your Honor, whenever we get a -- you know, at  
25 the ACLU, when we get a phone call about something like this,

1 we say we're already working on this issue. We've got a  
2 case. We're already working on this. We're trying to get a  
3 ruling on it. And so it's very important when a case like  
4 this is brought and it's built up over -- the record is built  
5 up and lots of energy and time is spent on it year after  
6 years -- after years and years --

7 THE COURT: It's only important if it's still an  
8 issue.

9 MR. KOROBKIN: Oh, I think it's certainly still an  
10 issue, your Honor.

11 THE COURT: Well, you say that, but when I press you  
12 about evidence, there isn't any.

13 MR. KOROBKIN: Well, I suppose that I -- you know,  
14 I'm not here with witnesses. I'm not here with affidavits.  
15 I'm here trying to argue a balanced --

16 THE COURT: You're not. You're not --

17 MR. KOROBKIN: Yeah.

18 THE COURT: -- you know, and if you want me to find  
19 cause to grant relief from the stay because this is such an  
20 important issue, I would have expected that, frankly.

21 MR. KOROBKIN: Well, your Honor, I think if we were  
22 here on a -- you know, if we wanted to bring a motion for  
23 injunctive relief against the city, that would be a -- that  
24 would be a separate situation, but --

25 THE COURT: Oh, no. You wouldn't want to do that

1 because that would violate the stay, wouldn't it?

2 MR. KOROBKIN: I'm sorry.

3 THE COURT: That would violate the stay, wouldn't  
4 it?

5 MR. KOROBKIN: Well, I don't know, but it would be a  
6 separate -- it would be a -- it would be a case that's  
7 different from this one.

8 THE COURT: Well, let's not argue about whether that  
9 would be the right thing to do or not. Still the burden is  
10 on you to present facts in support of your claim, huh?

11 MR. KOROBKIN: Yeah. I mean the facts are really  
12 what the record -- what the record shows right now, which is  
13 that, you know, what the city would have to do if the stay  
14 were lifted is probably argue an appeal --

15 THE COURT: They're not going to do that. We know  
16 that.

17 MR. KOROBKIN: I don't know, your Honor. I mean --

18 THE COURT: Mr. Fusco just told you. It's a little  
19 disturbing that you continue to challenge his representations  
20 here in court.

21 MR. KOROBKIN: If the city dismisses its appeal,  
22 then they dismiss their appeal, and I suppose that's it, but  
23 I don't know that them saying --

24 THE COURT: All right. Anything further, Mr. Fusco?

25 MR. FUSCO: No, your Honor.

1 THE COURT: All right. I'll take this under  
2 advisement and issue a written opinion.

3 MR. KOROBKIN: Thank you, your Honor.

4 THE COURT: Okay. One second. Let's move to the  
5 motion for reconsideration on the Phillips matter, please.

6 MS. GRIMM: Good afternoon, your Honor. Assistant  
7 Attorney General Nicole Grimm appearing on behalf of the  
8 state defendants in this case. Your Honor, we have moved --

9 THE COURT: Let's get other counsel's appearances.

10 MS. GRIMM: Oh, I'm sorry.

11 MR. PHILO: John Philo on behalf of the Phillips  
12 plaintiffs and petitioners.

13 MR. SANDERS: Herb Sanders on behalf of Phillips.

14 MR. MACKELA: Scott Mackela also on behalf of the  
15 petitioners.

16 MR. GOLDMAN: Shawn Goldman on behalf of the  
17 petitioners.

18 MR. FUSCO: Timothy Fusco, Miller, Canfield, Paddock  
19 & Stone, on behalf of the city.

20 THE COURT: Okay.

21 MS. GRIMM: I apologize, your Honor.

22 THE COURT: Okay.

23 MS. GRIMM: Again, Assistant Attorney General Nicole  
24 Grimm. We have moved for reconsideration of this Court's  
25 order in the Phillips case, and I hope that we've laid out

1 the reasons for that in our brief, but I'll just highlight a  
2 few of them. Your Honor recognized in its order denying the  
3 NAACP's motion for relief from stay and granting Phillips'  
4 motion for the same that its stay extension order applied to  
5 any lawsuits against the treasurer or the governor that might  
6 impact Detroit's Chapter 9 bankruptcy proceedings. In this  
7 case, in the Phillips -- in the petitioners' response to our  
8 motion for reconsideration, they concede that even their  
9 proposed amended complaint would pose serious questions as to  
10 the validity of actions taken by the emergency manager of  
11 Detroit, and, in fact, it would pose the very same serious  
12 questions that this Court recognized the NAACP lawsuit posed  
13 when it denied their motion for relief from stay, namely the  
14 lawsuit still challenges both facially and as applied in  
15 several municipalities, Detroit included, the  
16 constitutionality of PA 436. And as this Court recognized in  
17 its order as it pertained to the NAACP case, if PA 436 is  
18 found unconstitutional, that could or this Court said would  
19 result in the removal of the Detroit emergency manager, and  
20 that was an effect that this Court said cannot be overstated  
21 with regard to its impact on the Detroit bankruptcy  
22 proceedings. The very same thing --

23 THE COURT: Well, hang on. I said that in the  
24 context of a challenge to PA 436 when the defendant was the  
25 City of Detroit.

1 MS. GRIMM: I don't know that in the NAACP case --  
2 and I apologize. I don't believe the City of Detroit was an  
3 actual defendant in that case.

4 THE COURT: No, but it was clearly aimed at Mr. Orr.

5 MS. GRIMM: Okay. Sure. That's true. And this  
6 Court did --

7 THE COURT: But the Phillips case is not aimed at  
8 Mr. Orr, so the question is assume that the Phillips case  
9 gets all the way to the Michigan Supreme Court. Worst case  
10 scenario for you, the Michigan Supreme Court holds PA 436  
11 unconstitutional. What legal impact would that have, if any,  
12 in this bankruptcy?

13 MS. GRIMM: If PA 436 was found to be  
14 unconstitutional, it could result in the statute being  
15 considered void from its outset, which could invalidate the  
16 appointment of Kevyn Orr.

17 THE COURT: Considered by whom and in what  
18 circumstance?

19 MS. GRIMM: In this case, it would be by Judge Steeh  
20 in the first instance, and then going up on to the Michigan  
21 Supreme Court, if it's held unconstitutional, then the Court  
22 in its same decision could hold that the statute is void from  
23 the outset. That would be a very common thing for a court to  
24 hold.

25 THE COURT: Assume that worst case scenario. My

1 question to you remains what impact legally would that have  
2 in this bankruptcy?

3 MS. GRIMM: Well, if you remove -- as this Court  
4 said, if a finding that PA 436 is unconstitutional results in  
5 the probable removal of Kevyn Orr, that would affect --

6 THE COURT: That happen in the Phillips case?

7 MS. GRIMM: In the Phillips case, there are, for  
8 instance, facial constitutional challenges to PA 436. If PA  
9 436 is found unconstitutional, we cited just one illustrative  
10 case in our motion for reconsideration, the City of  
11 Maineville case, and that's a Sixth Circuit case holding that  
12 anytime a statute is considered unconstitutional -- or is  
13 found to be unconstitutional --

14 THE COURT: Yeah.

15 MS. GRIMM: -- it could be void from the outset.

16 THE COURT: Absolutely.

17 MS. GRIMM: So if that's the case and the statute is  
18 considered void from its beginning --

19 THE COURT: But the plaintiffs have assured me that  
20 they're not going to ask for the removal of Mr. Orr.

21 MS. GRIMM: And, respectfully, I don't think that  
22 matters, your Honor, because even if the Phillips plaintiffs  
23 are representing that they will somehow carve that out,  
24 that's the same representation that the NAACP plaintiffs made  
25 that this Court found was not sufficient because if PA 436 is

1 found unconstitutional, it could result in the removal  
2 regardless. If a statute is unconstitutional --

3 THE COURT: Well, but none of the plaintiffs that  
4 would be left in the Phillips case even have standing to ask  
5 for Mr. Orr's removal.

6 MS. GRIMM: That would be a question that could be  
7 addressed in an Article III court if and when we got there.  
8 It's worth noting, I think, that there would still be -- even  
9 with their proposed amended complaint, I believe, six  
10 residents of the City of Detroit would remain as plaintiffs,  
11 so --

12 THE COURT: Who?

13 MS. GRIMM: They are -- I would have to look at  
14 that.

15 THE COURT: Please.

16 MS. GRIMM: Okay. They're the Detroit Public School  
17 members and -- well, they're actually just listed as Detroit  
18 Public School Board members and the president of the Detroit  
19 Library Commission. I don't see the specific names of the  
20 school member board, your Honor. I apologize.

21 THE COURT: Right, but they're suing in their  
22 capacities as such to protect those official bodies, not --

23 MS. GRIMM: Sure.

24 THE COURT: -- as residents of Detroit to seek  
25 Mr. Orr's ouster; right?



1 MS. GRIMM: That could be true, and that could be  
2 the representation when we go and brief that in the District  
3 Court, but I think it's also worth noting that your Honor  
4 addressed the standing argument in the NAACP case and said  
5 that while they may or may not have standing, that was an  
6 issue that would be dealt with in the District Court  
7 specifically, and irrespective of this Court's determination  
8 on the standing issue, the fact remained that because PA 436  
9 was challenged constitutionality and could result in the  
10 removal of Kevyn Orr and, therefore, could leave no one to  
11 prosecute the bankruptcy under Section 18, then the stay  
12 needed to apply.

13 THE COURT: Okay. But I'm still confused about, you  
14 know, suppose this goes all the way to the Sixth Circuit or  
15 the Michigan Court of Appeals or the Supreme Court and you  
16 get a ruling that PA 436 is unconstitutional. I've already  
17 held it is, so what happens then? They certainly couldn't  
18 move in this Court for reconsideration. The time for that  
19 has passed, and it's law of the case.

20 MS. GRIMM: That is true as to this Court's  
21 eligibility determination, but it would remain that at least  
22 serious questions would be posed as to the ability of Detroit  
23 to continue.

24 THE COURT: Right. And you said that before, and I  
25 asked where would those questions be raised and in what

1 context? You know, you speak in passive voice here. Who  
2 would raise them? In what context? How would it impact this  
3 bankruptcy?

4 MS. GRIMM: I'm trying my best to answer your  
5 question, your Honor, and I might be just missing what the  
6 question is because what I was --

7 THE COURT: You are absolutely right that if a  
8 higher court or any court rules PA 436 unconstitutional, it  
9 would raise serious questions about whether Mr. Orr is  
10 constitutionally serving.

11 MS. GRIMM: Correct.

12 THE COURT: Grant you that. But how does that  
13 impact this bankruptcy?

14 MS. GRIMM: Because someone needs to prosecute the  
15 bankruptcy even if Detroit is eligible for bankruptcy, and  
16 if --

17 THE COURT: Why would he not be prosecuting this  
18 bankruptcy?

19 MS. GRIMM: Because a statute that has been held  
20 unconstitutional could be considered void from its outset,  
21 which would nullify Kevyn Orr's appointment. And if Kevyn  
22 Orr is not in office, then, as this Court has recognized, no  
23 one would --

24 THE COURT: Who would do that nullification?

25 MS. GRIMM: The court, I presume.

1 THE COURT: What court?

2 MS. GRIMM: Well, it could start with Judge Steeh,  
3 Judge Steeh, who has this case in the Eastern District of  
4 Michigan.

5 THE COURT: And you think he would do that even if  
6 the plaintiffs are not asking for it and don't have standing  
7 to request it?

8 MS. GRIMM: Well, the standing issue notwithstanding  
9 because we would address the standing issue, but the point is  
10 although standing may be an issue in this case as it is in  
11 NAACP, Judge Steeh would have the constitutional authority to  
12 hold that if he considers PA 436 unconstitutional, to hold  
13 that the appointment of Kevyn Orr is invalidated because the  
14 statute that allowed for his appointment is void from its  
15 outset, and that's really --

16 THE COURT: Do you agree with that?

17 MS. GRIMM: That would be an issue we would have to  
18 deal with in that court, but the touchstone is that, again,  
19 this Court has held that anything that -- any lawsuit that  
20 fits the other parameters that might impact the bankruptcy --  
21 the same with the NAACP case. We don't know that PA 436 will  
22 be held unconstitutional. We would argue it is  
23 constitutional, but there is a chance it would be held that,  
24 a chance it would be considered void.

25 THE COURT: All right. Thank you.

1 MS. GRIMM: Thank you.

2 THE COURT: City want to be heard?

3 MR. FUSCO: Yes, briefly, your Honor. First of all,  
4 your Honor, with respect to parties who may have standing  
5 named in the complaint -- and your Honor has referred to  
6 three Detroit residents who have official positions -- it's  
7 not at all clear to me that they're suing in their official  
8 capacity, but there are at least three or four others,  
9 Reverend Jim Holley, Reverend Charles Williams, Reverend  
10 Doctor Michael Owens, who hold no official positions, and  
11 they're just suing in their individual rights, and they are  
12 citizens of United States and residents of the City of  
13 Detroit, so I think they would clearly have standing to  
14 raise --

15 THE COURT: Okay. Thank you.

16 MR. FUSCO: -- that issue. And your question about,  
17 you know, who would bring -- if the plaintiffs don't bring an  
18 attack against Mr. Orr or the emergency manager, who else  
19 would do it, I think we've seen in this case in numerous  
20 instances it's fairly easy to find a surrogate to bring the  
21 action. If you have a determination by another court that,  
22 in fact, PA 436 is unconstitutional and void ab initio, to  
23 believe that you're not going to find among the people  
24 affected --

25 THE COURT: Well, but any such lawsuit would be

1 stayed; right?

2 MR. FUSCO: Perhaps, your Honor.

3 THE COURT: Why wouldn't it be?

4 MR. FUSCO: Here's my --

5 THE COURT: What would be the argument that it isn't  
6 stayed? Of course it's stayed.

7 MR. FUSCO: There's an issue that we're --

8 THE COURT: That's what the NAACP opinion held.

9 MR. FUSCO: There's an issue that we're forgetting.  
10 We can speculate all day on what would be the practical and  
11 legal effect of a ruling by a District Court or an appellate  
12 court that PA 436, the worst case, void ab initio and,  
13 therefore, no emergency manager in Michigan should ever have  
14 been -- have ever been appointed. Now, to believe that's not  
15 going to cast a pall over this case and the entire  
16 negotiations and everything else and the plan -- and it can't  
17 be raised -- I don't know why it couldn't be raised in the  
18 plan objection, on appeal from eligibility, on appeal from  
19 plan confirmation, but these people had an opportunity. At  
20 the hearing on the NAACP motion, you invited the NAACP to  
21 file an objection to eligibility and to raise the  
22 constitutional issues, and the NAACP declined.

23 THE COURT: I did, indeed, and that was part of the  
24 reason for denying the NAACP's motion, but if these  
25 plaintiffs do not challenge Mr. Orr's appointment but

1 challenge someone else's appointment, they wouldn't be  
2 objecting to the eligibility of the City of Detroit.

3 MR. FUSCO: Again, I think that's too narrow a  
4 reading on what's happening here and what the effect of this  
5 would be when this all could have been solved by filing the  
6 objection and raising these and having your Honor determine  
7 these constitutional issues.

8 THE COURT: Well, but think --

9 MR. FUSCO: And earlier this --

10 THE COURT: Let's think about -- let's think about  
11 that.

12 MR. FUSCO: All right.

13 THE COURT: A party who's in -- I don't know --  
14 City X where there's an emergency manager files an objection  
15 to eligibility and says, "I am a resident City X. I have no  
16 standing to challenge the eligibility of the City of Detroit  
17 to be in bankruptcy nor to the appointment of Mr. Orr to  
18 serve as emergency manager, but I want to object because I  
19 want to preserve my right to challenge PA 436 and the  
20 appointment of the emergency manager in City X." How far --

21 MR. FUSCO: With all due respect, that's --

22 THE COURT: How far would that eligibility objection  
23 have gotten?

24 MR. FUSCO: With all due respect, that's not what  
25 happened here. What happened here is you had --

1           THE COURT: Maybe, maybe not, but that's what --  
2 that's the question you are asking.

3           MR. FUSCO: No, that's not the question. We started  
4 this case with a direct challenge to Mr. Orr. What the  
5 parties did --

6           THE COURT: When you say "this case" --

7           MR. FUSCO: -- was say, "Okay. We will modify" --

8           THE COURT: When you say "this case," do you mean  
9 the Phillips case or --

10          MR. FUSCO: The Phillips case, Phillips case. We  
11 started. We had an attack on Mr. Orr as well as all the  
12 others, but --

13          THE COURT: Yeah.

14          MR. FUSCO: -- Mr. Orr as well, and most of the  
15 people here are Detroit residents, and that really was, I  
16 believe, the precipitating factor in the timing for this  
17 suit. And those people could have clearly had standing to  
18 bring an eligibility objection here, which would have avoided  
19 all of these issues. This morning you agreed to certify a  
20 direct appeal to the Sixth Circuit. Could have dealt with  
21 these issues, and we could have had an appeal, and there  
22 would have been no doubt about this bankruptcy case. Now, if  
23 a year from now someone filed in Flint, I suppose, we could  
24 deal with that issue at that time, but I don't know why they  
25 want to go to another court. We could have had that issue

1 resolved here, and now the effect of a ruling -- and, first  
2 of all, I think that what they're doing now still violates  
3 the extended stay order. Now, I think what you're doing if  
4 you allow them to continue is you're effectively modifying  
5 your earlier order, and that's, of course, your province to  
6 do that.

7 THE COURT: I granted relief from the stay or held  
8 that the stay didn't apply.

9 MR. FUSCO: Yeah, to do that, but I think that, you  
10 know, we're reading this too narrowly. The effects could be  
11 catastrophic, and we could have solved this by having them  
12 here. The equities just don't lie with permitting this to go  
13 forward at this time in the case.

14 THE COURT: All right. Thank you.

15 MR. PHILO: Good afternoon, your Honor. To address  
16 one of the -- at the outset, to suggest that our case was  
17 about Kevyn Orr is just patently not true. We were very  
18 disciplined in that complaint, and that complaint is about  
19 the State of Michigan. We have -- a majority of people are  
20 government officials from outside of Detroit. The ones who  
21 are within Detroit are not City Council --

22 THE COURT: When you say "we have," you mean the  
23 plaintiffs?

24 MR. PHILO: Yes, the plaintiffs. The ones within  
25 are school board members, correct, and a Library Commission



1 member. There are significant issues going on with the  
2 Library Commission in relation to the DPS emergency manager.

3 THE COURT: Right.

4 MR. PHILO: That is separate and distinct from any  
5 issues with the emergency manager over the City of Detroit,  
6 and, yes, we do have three people, one who is a reverend  
7 of -- who represents the Rainbow Push Coalition, which has  
8 members in Highland Park, has members in Pontiac, has members  
9 in Flint in addition to Detroit, so they are in that  
10 representative capacity. Conceivably they could have  
11 standing to challenge under the City of Detroit. Same with  
12 the minister who represents the National Action Network and  
13 same with the other minister who is a representative of the  
14 Baptist Council of Ministers of Detroit and Vicinity, but we  
15 have represented to this Court -- we have represented in our  
16 pleadings -- or our motion papers, I'm representing now we  
17 are not going to seek the removal of Kevyn Orr. I don't know  
18 what I have to do to make that clear. If there came a time  
19 where there was a ruling of unconstitutionality and we were  
20 going to claim some standing in that case and amend the  
21 pleadings, we would be back before this Court. We would not  
22 be allowed to proceed in that court until you had ruled  
23 whether we could do that, and we have an intention. Right  
24 now this case is about getting a declaration from an Article  
25 III court that has had the case for five months and had

1 briefed dispositive issues before that court to make the  
2 ruling on constitutionality. It is not asking for injunctive  
3 relief. It is not an enforcement action. If an enforcement  
4 action comes after that and it involves the City of Detroit  
5 to remove the emergency manager, that would be back before  
6 this Court. Steeh -- it is inconceivable that --

7 THE COURT: Judge Steeh?

8 MR. PHILO: -- Judge Steeh is going to run wild.

9 THE COURT: Judge Steeh?

10 MR. PHILO: Judge Steeh. I'm sorry. It is  
11 inconceivable that Judge Steeh is going to run wild and make  
12 rulings conflicting with your order in this case, conflicting  
13 with our representations over -- contravening what we're  
14 asking for on his own. It is not going to happen. And if it  
15 does happen, they're going to have an objection. They're  
16 going to be back in this court, and then there's going to be  
17 a resolution to that matter. There is no question that if it  
18 goes to that level, it comes back here.

19 You were asking where the issues would be resolved  
20 because you've made some rulings on constitutionality in this  
21 court, and then there would be a conflict if there's  
22 something that's different in any other court with respect to  
23 the other cities. Well, then it's going to the Sixth  
24 Circuit. I don't think there's any way around that, but that  
25 does not impact this bankruptcy in any way that would be

1 violating the stay or that is onerous and untoward under a  
2 constitutional democracy. I think we're forgetting to  
3 remember what this is about. What they are effectively  
4 saying is that the constitutional rights of every citizen in  
5 the state, 300,000 who are not even in Detroit and are  
6 presently under Public Act 436 governing is -- governance is  
7 put on hold until this bankruptcy is done. That is what is  
8 being asked. There is no court that has said that bankruptcy  
9 stays or procedures trump constitutional rights, and that  
10 would be a precedent that would be set in this case. It  
11 would be set --

12 THE COURT: Well, it happens all the time.

13 MR. PHILO: That it trumps constitutional rights?

14 THE COURT: Absolutely.

15 MR. PHILO: I don't think so, and let me just --

16 THE COURT: The automatic stay. The automatic stay  
17 says your claim that your constitutional rights were violated  
18 is stayed. It just is.

19 MR. PHILO: I would disagree, although I recognize  
20 where you're going.

21 THE COURT: Go find a single case that says because  
22 a claim is a constitutional claim --

23 MR. PHILO: Right.

24 THE COURT: -- it's excepted from the stay.

25 MR. PHILO: No. You're right. I think what you're

1 saying, at least to me, is the typical Section 483 -- or 1983  
2 case, which is about money --

3 THE COURT: That's true.

4 MR. PHILO: -- money damages. They're cases where  
5 money damages will correct the harm or at least to the extent  
6 possible correct that harm. This is not that case. There is  
7 no money. Michigan is on a grand experiment, and it's the  
8 first state in the country and the only state in the country  
9 that has this emergency manager model. It is the only one,  
10 and these circumstances were brought about by the choice of  
11 the legislature to go that way. There's been dozens and  
12 hundreds of other municipalities that have gone through  
13 bankruptcy before Detroit. Not one of them has done it with  
14 this model, and that's the difference here, and that's the  
15 difference. And it cannot be a model that we just say we put  
16 on hold at some indefinite point in the future. I do want  
17 to --

18 THE COURT: Is your challenge to PA 436 with respect  
19 to other cities any different than the challenge to PA 436  
20 that this Court already ruled on?

21 MR. PHILO: This is very different. To be honest  
22 with you, your Honor, I've looked at those challenges. I've  
23 read your ruling. I looked at the -- you know, I listened to  
24 your transcript. I do believe it's different. Now, there  
25 may --

1           THE COURT: And what is the -- what is the  
2 difference, sir?

3           MR. PHILO: The difference is -- and I'm trying to  
4 think of the individual creditors who filed claims. There  
5 may have been a few that referenced us, but the  
6 constitutionality of our claim is saying that as applied,  
7 that Public Act 436 is being applied in black communities.  
8 It's over 50 percent of black communities -- or the  
9 citizen -- black citizens of this state who can't effectively  
10 vote in local elections. That is the crux of an equal  
11 protection argument, a Voting Rights Act argument on  
12 different counts.

13           We also have an argument that is admittedly -- just  
14 simply because we haven't faced this before in the nation --  
15 is a 14th Amendment due process saying that if you are going  
16 to give lawmaking powers -- and make no mistake, there's been  
17 a transfer of lawmaking powers, legislative powers, from the  
18 Michigan legislature or from City Council to the emergency  
19 manager. They have the full power to repeal ordinances,  
20 change city charters, adopt ordinances. If that is going to  
21 occur in this country in a constitutional democracy, that has  
22 to be an elected official. We put constraints on  
23 administrative agencies whenever they sort of tread into that  
24 area. There are no constraints on the emergency manager.  
25 Michigan case law has held a city, locality, has the full

1 police power of the state at its -- in its local jurisdiction  
2 except where it's been specifically pulled back where there's  
3 a conflict with state law. That's the power that's been  
4 transferred to the emergency manager. We're saying that  
5 violates the 14th Amendment, and I know everyone who talks  
6 about the guarantee cross-claim initially says good luck, but  
7 when you --

8 THE COURT: Initially says what?

9 MR. PHILO: Says good luck, but we haven't faced  
10 this before, and Judge Sandra Day O'Connor in one of her last  
11 writings before she left the bench, said, you know, this  
12 history of saying guarantee cross-claims are nonjudicial --  
13 justiciable is not right. In fact, for many years they were  
14 justiciable, and she would change it. She was in the  
15 majority in that case, and I think this case presents the set  
16 of circumstances where it very well may, but, again, these  
17 arguments have not been faced by a court in this country  
18 before, and we think it's important -- incredibly important  
19 that they're heard now.

20 I do -- you made -- you had a lot of questions about  
21 what would be the impact on the bankruptcy, what might be the  
22 impact on Kevyn Orr's position if we prevail. I do not  
23 concede that a ruling of constitutionality raises to the  
24 level of a likelihood of removal situation. The standard for  
25 104 extension of stay is not might impact in some vague and

1 nonspecific way. It has to be greater than that, and  
2 overwhelmingly the cases that are extending the stays are  
3 where the defendants are really surrogates for the city -- or  
4 for the debtor. The debtor here is the City of Detroit, is  
5 not Kevyn Orr. The debtor is who was authorized to go into  
6 bankruptcy by the governor. If Public Act 436 is held  
7 unconstitutional, we have to -- they're asking you to assume  
8 the entire statute is unconstitutional. Yes, we have, in  
9 part, asked that. We've also asked for parts of it to be  
10 struck, and we specify which parts we have issues with. Not  
11 one of them addresses the bankruptcy authorization section of  
12 Public Act 436. We do not -- we did not contest eligibility.

13 THE COURT: Well, but doesn't PA 436 say that only  
14 the emergency manager has the authority to conduct the  
15 Chapter 9 case?

16 MR. PHILO: It does, but if that law is not on the  
17 books, then there's a question of whether PA 72 springs back  
18 the way it has, and PA 72 allows an emergency manager to go  
19 to bankruptcy. It does. I'm sorry. I don't mean to be  
20 arguing.

21 THE COURT: You're suggesting to me that under  
22 Michigan law when a law -- when a public act is held  
23 unconstitutional, the act that it repealed comes back into  
24 place?

25 MR. PHILO: Oh, in fact, that's why we had Public

1 Act 72. They argued that, and the Court of Appeals agreed  
2 with them.

3 THE COURT: No, no, no, no. PA 4 was not held  
4 unconstitutional.

5 MR. PHILO: You're correct.

6 THE COURT: It was rejected by the voters. That's  
7 an entirely different question, isn't it?

8 MR. PHILO: It is. It is.

9 THE COURT: All right.

10 MR. PHILO: But I'm not at all convinced it wouldn't  
11 have the same outcome, but these are issues that are going to  
12 have to be addressed and would be addressed in this court if  
13 it related to the City of Detroit. I don't think in any  
14 sense we can say that's the outcome. We can say that's an  
15 issue that's going to be addressed, and it would have to be  
16 addressed.

17 Additionally, I don't think -- and I know this is  
18 troublesome and this is not expedient, but I don't think that  
19 Chapter 9 necessarily protects the negotiator. It protects  
20 the debtor, and that's the City of Detroit. Chapter 9  
21 inherently involves a body of elected officials. The  
22 overwhelming majority of those cases are where elected  
23 officials filed or asked to file for bankruptcy and are  
24 controlling the negotiations. The only real exceptions in  
25 the past is where as a condition for the city to get into



1 bankruptcy, the state has said we get to appoint a  
2 representative, but Chapter 9 contemplates that elected  
3 officials are in charge. That's what's happened over 300  
4 times previously. Elections are not suspended. Public  
5 referendums on those officials are not suspended. It is an  
6 impediment to expediency, but it is not an unforeseen one at  
7 the time of drafting Chapter 9, so if Kevyn Orr is removed,  
8 it does not necessarily mean that eligibility is wiped off.  
9 It would be -- have a whole session of briefing before you,  
10 but it's entirely conceivable that the person at the table  
11 just changes, but, in any event, I think we've made clear we  
12 are not seeking to remove Kevyn Orr. Our case is not about  
13 Kevyn Orr. It's about emergency managers and that idea as a  
14 whole constitutionally. I will raise it because I think it's  
15 important -- and we put it in our brief -- is the idea that  
16 people -- constitutional rights are well recognized as  
17 fundamental rights, and when they are being violated, it is  
18 irreparable harm for every moment that it is violated.  
19 That's in a nut -- that's just basic in constitutional law.  
20 We do not have an alternative. I do expect that you will say  
21 because I --

22 THE COURT: Of course, the premise of that argument  
23 is that there is a constitutional violation.

24 MR. PHILO: Certainly, certainly.

25 THE COURT: But you don't have a constitutional

1 violation just because you allege one.

2 MR. PHILO: Oh, right. I agree. But they have  
3 not -- they've been -- I've been involved in four cases, your  
4 Honor, with the estate on these issues first with Public Act  
5 4 and now with Public Act 436. None of those were dismissed  
6 as frivolous or dismissed, in fact, you know.

7 THE COURT: Well, all right.

8 MR. PHILO: They've gone both ways. Two, I do think  
9 there are two important matters in that respect. In every  
10 other case where these constitutional rights have been at  
11 issue under Public Act 4 or 436, not once has an individual  
12 emergency manager come in and appeared separate and apart  
13 from the state except where that particular emergency  
14 manager's actions were at issue. The only impact in terms of  
15 draining resources is if they choose to intervene in our  
16 case. That hasn't happened. It was pending for five months.  
17 There was no --

18 THE COURT: Well, it would be an enormous drain on  
19 the resources of this city if Mr. Orr were removed in the  
20 middle of the bankruptcy and it required the termination of  
21 the bankruptcy. What a waste.

22 MR. PHILO: Well, I'm not going to dispute you of  
23 that. Yeah.

24 THE COURT: Fair enough?

25 MR. PHILO: That's a -- you know, it does throw a

1 huge wrench --

2 THE COURT: That's precisely why I hear the state  
3 and the city objecting to your motion.

4 MR. PHILO: Well, that's because they're trying to  
5 say we're trying to remove Kevyn Orr, which is not what we're  
6 doing, but also if that's what you're saying, if that law is  
7 declared unconstitutional two years after the bankruptcy  
8 closes, what's the impact?

9 THE COURT: I don't know.

10 MR. PHILO: Yeah.

11 THE COURT: Could somebody come in and move to  
12 vacate the confirmation order?

13 MR. PHILO: I mean we're not, but it's entirely --  
14 if that logic applies, that logic applies then as well as  
15 now. That's my point, your Honor.

16 THE COURT: That's right.

17 MR. PHILO: I have so much to say, and I think I've  
18 expended myself at the moment.

19 THE COURT: Okay.

20 MR. PHILO: Thank you.

21 THE COURT: Any reply?

22 MS. GRIMM: Just very quickly, your Honor, I would  
23 point out that although the petitioners are representing that  
24 this is not a lawsuit about Kevyn Orr, it's not about their  
25 intent. It's about the impact of their challenges, and I

1 looked it up. Actually it was on page 8 of this Court's  
2 opinion in the NAACP and Phillips order where this Court said  
3 that if PA 436 is found unconstitutional, Kevyn Orr would be,  
4 according to this Court, removed from office. Irrespective  
5 of what court that happens in, if Kevyn Orr is removed,  
6 there's no one to prosecute the bankruptcy.

7 And the only other point I would very quickly raise  
8 is that this Court has already addressed again in that same  
9 order the public interest factors and has recognized that the  
10 NAACP lawsuit and the Phillips lawsuit as well poses  
11 important questions about the constitutionality of PA 436  
12 and --

13 THE COURT: Okay. So how do I deal with the  
14 argument that says the citizens of City X who are concerned  
15 about the constitutionality of the service of their emergency  
16 manager shouldn't be stayed for the years it will take to  
17 resolve this bankruptcy case?

18 MS. GRIMM: If the petitioners want to dismiss their  
19 lawsuit and refile one that is an as applied challenge on  
20 specific facts to another municipality that would not have  
21 the dramatic effect or possible effect on the Detroit  
22 bankruptcy and that's something to which the stay would not  
23 apply, the state would not file a notice of stay in that  
24 case, and that could be adjudicated.

25 THE COURT: Well, but the challenge that the

1 citizens of City X feel they have is a challenge not as  
2 applied in City X but a facial challenge to PA 436.

3 MS. GRIMM: And if that is the case, your Honor,  
4 then I would submit that that clearly falls under this  
5 Court's stay extension order.

6 THE COURT: Fair enough, but they ask in requesting  
7 relief from that stay why should we be stopped from bringing  
8 our constitutional challenge? Why do we have to wait years  
9 for the City of Detroit to resolve its issues for us to bring  
10 this claim in vindication of our democratic rights?

11 MS. GRIMM: And the answer to that, your Honor, from  
12 our position would be, as this Court said, because it happens  
13 all the time. In bankruptcy proceedings, there's an  
14 automatic stay. In this case, there's an extension of that  
15 stay. In weighing the interests, yes, there is an interest  
16 in adjudicating this lawsuit. That's certainly true, but  
17 we're not talking about having it dismissed. We're talking  
18 about having it deferred in light of the important interests  
19 that this Court has recognized in completing the bankruptcy  
20 proceedings, getting Detroit back on track economically, the  
21 health and safety mechanisms back into action in Detroit and  
22 the impact that the Detroit bankruptcy proceedings has on the  
23 local and the regional and the national economy, so this  
24 Court I would submit has already addressed that question.

25 THE COURT: Thank you.

1 MS. GRIMM: Thank you.

2 MR. FUSCO: One brief comment, and I think your  
3 Honor alluded to that. We can't lose sight of the fact that  
4 this is the largest municipal bankruptcy in the history of  
5 the United States. It is unique.

6 THE COURT: Oh, that's on my mind all the time,  
7 but --

8 MR. FUSCO: It is absolutely on your mind.

9 THE COURT: But the rule of decision in regard to  
10 this motion would require the same result whether it's  
11 Detroit or Flint or some village in some county somewhere,  
12 wouldn't it?

13 MR. FUSCO: No. I respectfully disagree in the  
14 sense that if you read the complaint and you look at many of  
15 the allegations in the complaint about the percentage of  
16 people of color that are subject to public acts and  
17 everything, it's driven by Detroit, and that has the largest  
18 minority population, and that's what is the basis of many of  
19 the challenges.

20 We have a unique situation with Detroit. As your  
21 Honor notes, it is vitally important that we complete this  
22 Chapter 9 reorganization and that we bring finality to the  
23 process. And my point is simply you could have  
24 accomplished -- we could have accomplished both goals, giving  
25 persons an opportunity to challenge PA 436 and have an

1 orderly process for the bankruptcy which will lead to a final  
2 resolution by having those claims brought here. A ruling by  
3 your Honor that PA 436 is unconstitutional facially would  
4 certainly give the result that the plaintiffs desire. On the  
5 other hand, reaching the different result, which would have,  
6 of course, been appealed, we would now have certainty and  
7 finality. I think that's what the stay process is here to  
8 do, to protect the integrity of this case.

9 THE COURT: Anything further, sir?

10 MR. PHILO: I really don't.

11 THE COURT: No? All right. The Court will take  
12 this under advisement and issue an opinion. Thank you,  
13 counsel.

14 MR. FUSCO: Thank you, your Honor.

15 THE COURT: Okay. I'd like to deal now with the  
16 motion for relief from stay on behalf of Thomas Gerald Moore.

17 MR. KALISH: Good afternoon, Judge Rhodes. Jay  
18 Kalish on behalf of the movant.

19 THE COURT: Other appearances on this motion,  
20 please?

21 MR. FUSCO: Timothy Fusco, Miller, Canfield,  
22 Paddock & Stone, for the city.

23 MS. PATEK: Barbara Patek on behalf of the Detroit  
24 Police Officers Association.

25 THE COURT: Go ahead, sir.

1           MR. KALISH: Judge, this is our motion to lift the  
2 automatic stay for the limited purpose of being able to  
3 pursue the homeowners insurance of the police officers  
4 involved. This is a somewhat different situation in that the  
5 defendants in this case are two -- or at least were two  
6 Detroit police officers. One of them is no longer a Detroit  
7 police officer. And it is not aimed at the City of Detroit.  
8 The City of Detroit is not a party and isn't a defendant in  
9 this lawsuit.

10           The only additional issues other than what we said  
11 in our papers that I'd like to point out to the Court is, as  
12 I indicated, Officer Headapohl is no longer a Detroit police  
13 officer, and there doesn't seem to be any prejudice that I  
14 can find. The movant in this case is not looking for any  
15 estate assets. As I said, there is no --

16           THE COURT: What makes you think there will be such  
17 private insurance coverage?

18           MR. KALISH: Well, because prior to the filing of  
19 the bankruptcy case, there was discovery had in the District  
20 Court case, and the movant obtained copies of the individual  
21 police officers' homeowners insurance policies, and those  
22 policies do not seem to preclude the malicious prosecution  
23 action as a personal injury. In other words, we believe that  
24 it's a covered injury, and --

25           THE COURT: Let's pause there. Remind me what the



1 underlying claim is against the officers.

2 MR. KALISH: Certainly. The officers in September  
3 of 2011 were off duty, and they went into a bar. And there  
4 was a ruckus that ensued, and they caused the bar owner to be  
5 arrested and ultimately charged. That officer -- the  
6 defendant in that criminal case was acquitted, and it's the  
7 movant's position that there was no basis at all for anything  
8 that these police officers did.

9 THE COURT: So that's Mr. Moore?

10 MR. KALISH: Yes, sir. I found it interesting that  
11 in the debtor's affidavit that they attached to their answer  
12 it appears that the police officers requested through the  
13 normal chain of command some sort of indemnification from the  
14 city, and the Detroit Police Department rejected that  
15 request.

16 THE COURT: Right. So your client's claim -- Mr.  
17 Moore's claim is abuse of process or malicious prosecution,  
18 something like that?

19 MR. KALISH: Yes, sir. That's accurate.

20 THE COURT: And your position further is that their  
21 homeowners insurance policy would cover that.

22 MR. KALISH: It appears to.

23 THE COURT: Okay.

24 MR. KALISH: And I don't have anything further to  
25 add.

1 THE COURT: Right. Okay.

2 MR. KALISH: I'm happy to answer any other  
3 questions.

4 THE COURT: Thank you, sir.

5 MR. KALISH: Thank you, Judge.

6 MR. FUSCO: Your Honor, just for the record, I  
7 forgot my colleague, Marc Swanson, is here with me. Your  
8 Honor, let me just clear up the indemnification issue. There  
9 is a several-step procedure in the collective bargaining  
10 agreement with respect to requests for indemnification. It's  
11 true that the police department issued a recommendation that  
12 indemnification not be granted. Next step is it's submitted  
13 to the City Council. If the City Council concurs, then there  
14 is a mandatory arbitration procedure before an umpire to  
15 determine if the city should indemnify. I will say that I  
16 was told by the city law department that we never win those,  
17 and it's -- that it's highly likely that indemnification will  
18 be granted. But as the Court noted in --

19 THE COURT: What's the status of that process in  
20 this case at this point in time?

21 MR. FUSCO: It's sitting there. The parties have to  
22 actually agree on the package to be submitted to the City  
23 Council for review. I think that's what's going on. If it's  
24 a denial, then within 30 days you have to have an arbitration  
25 hearing, and then the arbitrator must rule within 30 days

1 after that, but we are -- under the collective bargaining  
2 agreement, we are obligated to provide a defense until such  
3 time as a final determination is made on indemnification, and  
4 we are defending the two officers in these -- in this matter.

5 I understand Mr. Kalish saying there's no harm here  
6 because we're not proceeding against the city or any asset of  
7 the city, and, of course, the focus here is the -- is on  
8 who's the real party in interest in this litigation, which is  
9 the city, and, secondly, look at what he's trying to do. It  
10 sounds like what he's doing is trying to enforce a judgment  
11 to -- if he had a judgment against the officers, he could  
12 garnish any applicable policy of insurance and try and obtain  
13 payment, but he would need to establish liability first.  
14 That's really our principal concern. We don't -- we've asked  
15 for a copy of the policy. I've not seen it, but he -- and  
16 even he says it may or may not cover this. You're going to  
17 have to determine liability. You're going to have to  
18 determine that the officers did something that would come --  
19 that would violate the plaintiff's constitutional rights and  
20 that that type of claim -- or acted maliciously, which is a  
21 tort, and that that is covered by the homeowners insurance.  
22 Well, what you're doing then is you're litigating the entire  
23 underlying complaint claim for which the city likely has  
24 liability to indemnify the officers.

25 THE COURT: Help me out with the insurance issue.

1 If there is liability found, number one, and, number two, the  
2 insurance company accepts responsibility for that and pays  
3 Mr. Kalish's client, under insurance law is the insurance  
4 company then subrogated to its insured's right of  
5 indemnification against the city?

6 MR. FUSCO: It would be an equitable subrogation  
7 with respect to that, so it could proceed back against the  
8 city, and this isn't the case that we see all the time in  
9 Chapter --

10 THE COURT: So your argument is that even though  
11 facially the claim is on the insurance policy, ultimately it  
12 comes back to the city.

13 MR. FUSCO: That's right. And because we're  
14 defending, too, you have issues -- you have problems with  
15 issue preclusion in any determination with respect to the  
16 homeowners insurance policy. This isn't a case we see in  
17 Chapter 11 all the time where a debtor has insurance and the  
18 stay is lifted to let the party proceed against the insurance  
19 and limit its recovery to the proceeds of insurance with no  
20 liability of the debtor. That is just not what's going to --  
21 is being sought here and is what is going to happen. This is  
22 a case that we will designate to be part of the ADR  
23 proceeding.

24 Now, if it's part of that, someone wants to raise  
25 the issue of whether there's coverage from the homeowners

1 insurance, I assume it can. As your Honor knows from the ADR  
2 order, you can agree to anything you want. You can raise any  
3 issue in ADR. This is a perfect case for the ADR process to  
4 be utilized, and this isn't a 1983 action. I know this  
5 morning your Honor said he would consider whether you might  
6 want to adopt some different procedures for 1983 cases. This  
7 is a tort. Malicious prosecution is a tort. Did they have  
8 probable cause to do what they -- to do what they did? So we  
9 think that the -- what should happen here is that the stay  
10 motion should be denied and this should just proceed in the  
11 ADR process where, of course, the issue of other insurance,  
12 other coverage and other things can be raised and evaluated.

13 THE COURT: Thank you.

14 MS. PATEK: Good afternoon, your Honor. Again,  
15 Barbara Patek for the Detroit Police Officers Association.  
16 I'm going to start by saying that I hope the city is right  
17 about how these arbitrations come out on the indemnification  
18 issue because, as the Court heard this morning in dealing  
19 with these ADR procedures, these officers, whether they are  
20 current or former public safety employees, are faced with an  
21 indemnification claim against the city that has the potential  
22 for simply being treated as an unsecured claim under the  
23 plan. We don't know how that's going to come out at this  
24 point in time, and if there's a judgment against them and not  
25 some other way to satisfy it, I mean they're essentially

1 facing financial ruin.

2 THE COURT: Well, but what are the facts here on  
3 which these officers contend that they are entitled to  
4 indemnification?

5 MS. PATEK: My understanding of the underlying case  
6 is that the officers' versions of the facts are significantly  
7 different than the plaintiff's version of the facts and that  
8 they believe they were acting -- that they were in a place  
9 and they were acting as police officers. They made an  
10 arrest. There was a prosecution that resulted. The result  
11 was an acquittal, and now there's a lawsuit against them.  
12 And how that comes out is going to -- you know, however it  
13 comes out, if they're wrong, if they did something --

14 THE COURT: Well, why was the indemnification claim  
15 denied?

16 MS. PATEK: My understanding is it's not -- first of  
17 all, the city was not named as a defendant in this case. I  
18 don't want to go too much into the particulars, but I think  
19 it was based on the fact that the allegations were that this  
20 was essentially an intentional tort, a malicious prosecution  
21 case, which comes to another issue, and I don't -- I'm not --  
22 I think I've answered the Court's question, but I want to  
23 step forward on this insurance issue. What we have here is  
24 rank speculation that there's going to be some coverage by a  
25 homeowners policy. To our knowledge, there has not been a

1 demand on these defendants that they tender the defense. I  
2 think the only possible way you would have coverage -- I'm  
3 sure there's a cooperation clause, all of those things in  
4 that policy -- you're not going to come up with a judgment at  
5 the end and go to the insurance company and say, "Insurance  
6 company, pay this policy." They should be in the case from  
7 the beginning if that's the case. These officers -- I  
8 suspect why it hasn't been tendered is because they were and  
9 have taken a strong position that they were acting in the  
10 course of their employment and in the good faith performance  
11 of their duties. This is not something that would be  
12 covered, and the thought that a malicious prosecution -- and  
13 I've not seen any policy or other intentional tort -- would  
14 be covered under any insurance policy that I know of under  
15 Michigan law seems to me to be vanishingly unlikely, and we  
16 are very opposed to any modification of the stay. We think  
17 this process should play itself out. If at the end of the  
18 day we're wrong and these officers are not entitled to  
19 indemnification, then that may be the appropriate time to  
20 bring a motion before this Court, but right now I think we're  
21 entitled to the protection of the extended stay, and if we  
22 can go through the ADR procedures and somehow resolve this  
23 case that way, that would be our preference.

24 THE COURT: Thank you. Mr. Kalish, anything  
25 further?

1           MR. KALISH: Just very, very briefly, Judge. First  
2 of all, I don't believe that there's really any substantial  
3 difference between the basic concept which we face in Chapter  
4 11 cases when there's an insurance policy. You still have to  
5 get to liability, and you still have to deal with insurance  
6 companies that are in the business of not paying claims, and  
7 so without some sort of a finding that there is a basis to  
8 pay a claim, you're never going to get one.

9           As to counsel's last comment, we got the insurance  
10 policies just prior to the Chapter 9 case being filed, and so  
11 there hasn't been any time to make any demands or anything  
12 else like that, but suffice it to say that the AAA homeowners  
13 insurance policy has a definition of personal injury that  
14 includes malicious prosecution, and so are they going to pay  
15 voluntarily? I'm guessing probably not, but we still have to  
16 get to that point, and that's the basis for our motion.

17          THE COURT: Thank you. The Court will take this  
18 matter under advisement.

19          MR. KALISH: Thanks, Judge.

20          THE COURT: Let's turn our attention now to the  
21 motions for relief from stay filed by St. Martins Cooperative  
22 and St. James Cooperative and others.

23          MR. FUSCO: I believe St. Martins has been resolved,  
24 your Honor, as part of the --

25          THE COURT: Okay.



1 MR. FUSCO: -- objection process this morning that  
2 we went through. I think Lasalle is still to be heard.

3 THE COURT: Okay. Thank you.

4 MS. CLARK: Your Honor, Tracy Clark appearing on  
5 behalf of the movants, and that's in connection with the  
6 Lasalle motion, not with respect to the St. Martins. Also  
7 present today is Kerry Morgan, who's the attorney that was  
8 handling the class action previously.

9 Your Honor, the movants are housing cooperatives,  
10 and they're made up of individuals who own and reside in  
11 multiple-unit housing. They are being charged commercial  
12 rates, so the cooperatives being charged commercial rates,  
13 where the next door neighbor might be a house and it's a  
14 single-unit housing, it's being charged residential rates.  
15 So as a result of this disparate treatment, the housing  
16 cooperatives filed a class action to basically halt this  
17 process because it's a violation of the equal protection  
18 clause of both the state Constitution and the United States  
19 Constitution. The claims are for damages for having been  
20 charged -- overcharged in the past as well as for injunctive  
21 relief going forward. Motions were filed to certify the  
22 class, so the class has not been certified, but there was a  
23 motion for class certification, and then the Detroit Water  
24 Department filed a motion to dismiss the case in its  
25 entirety. There was a hearing on both of these motions, and

1 the federal District Court, Judge Drain, indicated at  
2 those -- at the end of the hearing that he would be in a  
3 position to determine or decide those motions at the end of  
4 approximately a week, but in the meantime the bankruptcy case  
5 was filed, and the stay was put in place, and the proceedings  
6 were halted.

7           So we're here today asking for relief so that we  
8 continue -- can continue those proceedings in front of Judge  
9 Drain, and the cause that we believe provides your Honor with  
10 sufficient basis for granting relief is based on balancing  
11 the interests of the parties, so, first of all, we have the  
12 cooperatives that have an interest in their equal protection  
13 claims, and, second of all, we have the city's interest in  
14 formulating a plan of reorganization, and then finally we  
15 have the judicial system's interest in efficient and  
16 effective administration of the cases. And I have to submit  
17 that all of these interests would be better furthered if  
18 relief is granted from the stay. And the reasons, as  
19 explained in the brief, is, number one, it's been over a year  
20 since the complaint was filed seeking to certify the class  
21 and for the protections under the equal -- or for the  
22 violation of the equal protection clause. Discovery has  
23 occurred. Motions were heard, as I indicated. The judge is  
24 familiar with these claims, and he indicated he was ready to  
25 rule in approximately seven days. He's also familiar with

1 the substantive issues.

2 Second of all, absent a lift of the stay, I'm not  
3 sure how the cooperatives can pursue their injunctive relief  
4 because they want to stop the process going forward, so if  
5 they're denied that, they're going to be denied their due  
6 process entirely, so if a post-petition claim is required to  
7 be brought, this whole process has to start anew in federal  
8 District Court, and the Bankruptcy Court would not have  
9 jurisdiction to determine these post-petition claims because  
10 there's no nexus between the bankruptcy estate and these  
11 equal protection claims. There's no -- we're not asking the  
12 debtor to have to pay anything to the cooperatives.

13 And there's a number of factors in addition to the  
14 fact that there's no jurisdiction. If the jurisdiction was  
15 determined on some potential related to interest, then  
16 there's a number of factors that favor withdrawal of the  
17 reference.

18 And, finally, it's definitely not a core proceeding,  
19 and so the Bankruptcy Court could not enter a final judgment,  
20 so in the end we all get back in front of Judge Drain to  
21 determine whether or not this proceeding would result in  
22 favorable or unfavorable to the cooperatives.

23 So to avoid all these issues -- there's  
24 jurisdiction, there's withdrawal of the reference, there's a  
25 core proceeding issue -- to avoid all these issues, we could

1 lift the stay, allow the matter to go forward in front of  
2 Judge Drain. He can decide the injunctive issue as well as  
3 the pre-petition claims, which would provide us with a number  
4 to file a proof of claim in the Bankruptcy Court and then the  
5 post-petition claims, so for that reason, your Honor, we're  
6 asking for relief from the automatic stay.

7 THE COURT: Thank you.

8 MR. FUSCO: Your Honor, again, Timothy Fusco and  
9 Marc Swanson for the City of Detroit. Your Honor, at the  
10 outset we will -- the city has elected to designate this  
11 case -- this claim as part of the ADR process. We don't  
12 think it's one of the three types of claims that are  
13 predesignated, but we are designating this case to be  
14 submitted. What we're dealing with --

15 THE COURT: Well, but didn't Mr. Ellman tell me this  
16 morning that ADR isn't suitable when the relief sought is  
17 injunctive?

18 MR. FUSCO: There is a provision in the arbitration  
19 language which states that if you agree to arbitrate, which  
20 is entirely voluntary, one of the conditions is -- and,  
21 again, both parties can agree to the contrary -- one of the  
22 conditions is that you cannot seek injunctive relief,  
23 attorney fees, punitive damages. I think that's what he was  
24 alluding to. It only comes into play when you reach that  
25 third stage of the ADR process. In the first stage, which is

1 the offer and counteroffer, and in the second you can ask for  
2 anything you want, but you don't need injunctive relief in  
3 this --

4 THE COURT: Where's the ADR compromise on whether  
5 the water rates charged to these plaintiffs should be the  
6 commercial rate or the residential rate?

7 MR. FUSCO: Well, that's part of the whole claim  
8 resolution process, but if I may, let me clear up two things  
9 to begin with. Ms. Clark stated several times that she can  
10 file a new District Court action, which we believe is just  
11 not correct. This is a Chapter 9 case, and this issue was  
12 raised in Jefferson County, and several parties in that case  
13 sought a determination that the automatic stay did not apply  
14 to actions they sought to file against the county because the  
15 claims arose post-petition. Judge found that even though  
16 post-petition claims were stayed by 362(a)(3) since they  
17 sought possession of the property of the estate and to  
18 exercise control of the estate. He also looked at whether 28  
19 U.S.C. 959, which authorizes suits against trustees in  
20 possession, would apply and said it doesn't because those  
21 parties are not trustees within the meaning of that section.

22 Third, as you know, in a plan of adjustment it  
23 discharges all claims up to the date of confirmation, so all  
24 of these things can be dealt with as part of the claims  
25 process.

1           In addition, you don't really have, as you know, the  
2     concept of administrative expenses in a Chapter 9 case  
3     because you don't have a bankruptcy estate as you would in a  
4     Chapter 11, in a Chapter 11 case.

5           Secondly, there are five petitioners in this case.  
6     There are five parties. And I've sought class certification,  
7     but it's not been granted, and it gets a little interesting  
8     on how you treat class claims in a bankruptcy case. There  
9     have been two significant decisions on that, one out of the  
10    Southern District of New York, In re. Ephedra Products  
11    Liability Litigation, and one in Texas, Northern District of  
12    Texas. And where these two come out is unless the class was  
13    certified pre-petition, the class representatives need to  
14    file a proof of claim and move for class certification under  
15    Rule 723, so until that occurs, we're dealing with five  
16    people here who say we've been overcharged for our water.  
17    That's something easily susceptible to resolution in ADR.

18           Now, there is an underlying issue of whether I  
19    should be charged individually or whether I should be charged  
20    as a commercial rate because this is a cooperative. And I  
21    think where the dispute arises, just by way of background, we  
22    said if you want to put in individual meters, we will allow  
23    you individual rates, but the cooperative doesn't want to do  
24    that. It wants to have one meter and then somehow divvy up  
25    the whole thing, but it's a money issue. How much money were

1     you overcharged?

2             THE COURT: Well, but it's an ongoing issue.

3             MR. FUSCO: But as part of the resolution, in order  
4     to determine that claim, you have to determine this  
5     fundamental issue. I mean I suppose you can reach an issue.  
6     We'll pay you a hundred thousand dollars, to pick a number  
7     off the top of my head, and that'll resolve it, but if you're  
8     going to actually resolve the claim or if we get to the third  
9     stage and this becomes a claim objection process in front of  
10    your Honor, you're going to have to reach that decision.  
11    You're going to have to decide should you have been charged  
12    as an individual --

13            THE COURT: Now, suppose we have a trial tomorrow  
14    here on the issue of whether this is overcharged and I say,  
15    yes, it was. Where's their ongoing relief?

16            MR. FUSCO: Well, I would assume you have the power  
17    to enforce your orders, and so if the city continues to bill  
18    and try to collect at a higher rate, you simply enforce your  
19    order. It's not an injunctive issue.

20            THE COURT: They have to file a proof of claim every  
21    month?

22            MR. FUSCO: Pardon me?

23            THE COURT: They have to file a proof of claim every  
24    month?

25            MR. FUSCO: No. You have other remedies.

1 THE COURT: Where is their relief post-confirmation?

2 MR. FUSCO: You have other remedies available to  
3 you.

4 THE COURT: Where is their relief post-confirmation?

5 MR. FUSCO: But is the whole -- does this case turn  
6 on just because you've added a count for injunctive relief,  
7 that because I brought this action and say I'm being  
8 overcharged by "X" dollars a month and I want you to pay back  
9 the money, and I want you --

10 THE COURT: When it's a --

11 MR. FUSCO: -- to stop doing it --

12 THE COURT: When it's a continuing claim, why not?  
13 It arises every month.

14 MR. FUSCO: Well, it's going to --

15 THE COURT: Every month.

16 MR. FUSCO: -- be a continuing claim, and the plan  
17 is going to deal with that if we don't resolve it in any  
18 other way. Now, the next question, okay, what happens the  
19 day after the plan is confirmed.

20 THE COURT: The plan will say I'll pay ten cents on  
21 a dollar on unsecured claims. How does that resolve the  
22 problem the day after confirmation?

23 MR. FUSCO: Well, once -- the day after  
24 confirmation, the stay goes away, and I assume you can bring  
25 it again if you want, but that assumes that there's no merit



1 to going through the ADR process. You had a prior settlement  
2 on part of these claims. There's no reason to believe this  
3 process would not be beneficial in doing it. There's nothing  
4 to distinguish this case from the other claims we're trying  
5 to resolve. I mean we have --

6 THE COURT: (Inaudible) tort claim is a one-time  
7 incident.

8 MR. FUSCO: Um-hmm. And this was an incident  
9 that -- it occurred pre-petition. The damages continue to  
10 accrue, but the incident pre-petition was when the city --

11 THE COURT: Every bill is a new claim.

12 MR. FUSCO: Every new bill is an element of the  
13 damages. It's an element of the claim. And that claim is  
14 treated the same up until we confirm the plan of adjustment,  
15 and these issues are going to be resolved as part of the  
16 claims resolution process. And you're also forgetting the  
17 class action procedure if you're looking at the effect on the  
18 city if we're dealing with these five claims, but what you've  
19 asked for is a certification, I don't know how many co-ops  
20 there are out there and how many people they supply to, but  
21 this becomes inextricably intertwined with the entire  
22 treatment of the Water and Sewer Department. As your Honor  
23 knows, the emergency manager is endeavoring to reach a  
24 resolution of what to do with the Water and Sewer Department.  
25 There are a couple of things floating around right now. Five

1 claims may not make much, but a class certification is  
2 another issue, and that's one that should be handled by you  
3 and not by another court. Rule 7023 clearly gives you the  
4 right in your discretion to certify a class for claims  
5 purposes.

6 THE COURT: Do you want me to determine whether  
7 these --

8 MR. FUSCO: I think in the bankruptcy context --

9 THE COURT: -- citizens are being overcharged?

10 MR. FUSCO: I think the issue of whether to certify  
11 the class for purposes of claim determination is within your  
12 sole discretion under Rule 7023. No court has ever referred  
13 it to another court. If you don't have a certification on  
14 the day of filing, it becomes a bankruptcy issue, and it's  
15 your decision, and it has to be done timely so we don't delay  
16 the bankruptcy process, but the burden is on the movant to  
17 come in front of you and say, "I want this claim certified as  
18 a class," and then it's a discretionary judgment with you  
19 whether you do that or not, which you determine in the  
20 context of the normal issues we deal with in bankruptcy. We  
21 should not be ceding that to another court. I mean I think  
22 it's clear under 7023 it's your determination. It's not the  
23 District Court to determine whether we should certify this as  
24 a class. Now, are you going to have to get involved in  
25 determining whether the city is properly using commercial or

1 residential? You may have to as part of the -- as part of  
2 the final stage if we can't settle. Then it goes to  
3 litigation in front of you. This is not one of the 157  
4 matters which you can't hear. You can clearly enter a final  
5 judgment and determine this, and that's the way -- we believe  
6 at this point in the case that's exactly what should happen.  
7 I have every confidence we will probably resolve it, but we  
8 need to start the process.

9 MS. CLARK: Your Honor, I think, based on your  
10 comments, that you understand the primary concern here is the  
11 injunctive relief going forward, and if we can't bring post-  
12 confirmation claims, how are we going to pursue that  
13 equitable relief? Mr. Fusco keeps referring to basically  
14 damage claims, and this is more than damage claims. It's  
15 ongoing constantly, and claims continue to accrue every day.

16 As far as the ADR process goes, as we indicated,  
17 this not a certified class at this point. It's not defined,  
18 so I'm not sure exactly how this process would work with each  
19 co-op filing their own claim and each separate claim being  
20 sent to ADR and then if no -- if they don't agree --

21 THE COURT: How many co-ops are there in the class?

22 MS. CLARK: At this point, there's five, but  
23 there's -- there could be more because it hasn't been defined  
24 yet. They get a notice process, and people can -- co-ops can  
25 elect in. There could be 30. Then we -- if they don't agree

1 after all this ADR procedures goes through, then we're back  
2 to square one, and we don't have our injunctive relief  
3 availability at all.

4 THE COURT: I wonder why the claim rises to the  
5 level of a constitutional claim. Why isn't it just a  
6 question of whether the city is administering its rate  
7 structure properly?

8 MS. CLARK: Your Honor, I did not file the class  
9 action lawsuit. It was filed --

10 THE COURT: Do you have an answer for me, sir?

11 MR. MORGAN: Yes, your Honor. Kerry Morgan  
12 appearing on behalf of Lasalle plaintiffs. Your Honor, this  
13 case was filed an equal protection claim because there was a  
14 prior Court of Appeals decision, Alexander versus City of  
15 Detroit, which held that the city's classification of a rate  
16 structure in another context, which said if there's four or  
17 less residences within a single structure, that was  
18 residential. If there's five or more within a single  
19 structure, that's treated in a commercial manner. The Court  
20 of Appeals -- Michigan Court of Appeals found that to not  
21 pass the rational basis test and declared it  
22 unconstitutional.

23 We came in, and we said, look, the same principle  
24 applies to this classification. They've chosen to take my  
25 clients, who have structures in which some have ten

1 individual dwellings under the cooperative system, which is  
2 not a condo and it's not a townhouse and it's not an  
3 apartment complex, its own unique body of ownership, and  
4 they've said, oh, that's more than four; therefore, it's  
5 commercial and it's not residential even though it's  
6 residential in every other capacity.

7 THE COURT: So your claim is not that the city is  
8 not administering its rate structure according to its terms.

9 MR. MORGAN: No. It is that they're --

10 THE COURT: Right. All right. I understand. Thank  
11 you.

12 MR. MORGAN: Thank you, your Honor.

13 THE COURT: Did you have something further, Ms.  
14 Clark?

15 MS. CLARK: No. Thank you, your Honor.

16 THE COURT: All right. The Court will take this  
17 under advisement. Is that our last one today?

18 MR. FUSCO: I believe that's it.

19 THE COURT: All right. We will be in recess then.

20 THE CLERK: All rise. Court is adjourned.

21 (Proceedings concluded at 4:04 p.m.)

## INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

December 19, 2013

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Lois Garrett